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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF:
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP
a Louisiana Partnership,

Petitioners

v.

FIRST FINANCIAL BANK, FSB,
a Federal Savings Bank, and
JEAN HEBERT TURNER, TRUSTEE,
a Trustee in Bankruptcy under Chapter 7,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. What is the correct procedure a trustee must follow to accept a lease under 11 U.S.C. 365(d)(4)? When must a trustee act? What is the effect of inaction?

2. What is the solution to the conflict which arises when a lessor exercises his rights under 11 U.S.C. 365(d)(4) after the failure of a trustee to assume a lease within the time prescribed, but the trustee proceeds to conduct a sale of the lease pursuant to 11 U.S.C. 363? Does 11 U.S.C. 365(d)(4) prevail to cause the sale to be a nullity or does 11 U.S.C. 363(m) operate to cure such a nullity by mootness for failure to obtain a stay order pending appeal? Generally, do the provisions of 11 U.S.C. 363(m) supercede or invalidate the legal effects of 11 U.S.C. 365(d)(4) once the lease rejection remedy is invoked by the lessor?

3. What is the effect upon a trustee's sale pursuant to 11 U.S.C. 363 when the proceedings resulting in the order of sale were conducted under an injunction and stay order against the owner of the property sold (the lease) prohibiting such owner from continuing the prosecution of state court matters wherein such owner had become a state court judgment winner of an injunction against the sale of such property? Are federal courts permitted to interfere with pending state court proceedings by enjoining recourse to those proceedings? Are such injunctions in violation of the Anti-Injunction Act? What is the effect on federal court proceedings conducted during the effective period of such injunctions and stay order? May a federal court avoid the comity principles of *Younger v. Harris* and *Pennzoil v. Texaco?* Do *Younger* and *Pennzoil* principles permit a federal court(s) to excuse deliberate bypass of judicial remedies in a state's judicial system where there is no procedural bar to a full and fair state court consideration of a litigants cause?

LIST OF ALL PARTIES

The parties in the Court of Appeals for the Fifth Circuit were:

Tulane Hotel Investors Limited Partnership,
Appellant in the Fifth Circuit, Appellant in the District Court, Debtor in the Bankruptcy Court and Petitioner in this Petition,

First Financial Bank, FSB,
Appellee in the Fifth Circuit, Appellant in the District Court, Creditor in Bankruptcy Court and Respondent in this Petition,

Jean Hebert Turner, Trustee,
Appellee in the Fifth Circuit, Appellee in the District Court, Chapter 7 Trustee in Bankruptcy in the Bankruptcy Court and Respondent in this Petition.

LISTING UNDER SUPREME COURT RULE 28.1

Set forth below is a listing of affiliates of petitioner Tulane Hotel Investors Limited Partnership:

Tulane Hotel Investors Corporation,
General Partner of Tulane Hotel Investors Limited Partnership

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 9, 1987 dismissing portions of petitioner's appeal as moot.

OPINIONS BELOW

The Opinions and Orders of the United States Court of Appeals for the Fifth Circuit appear as Appendix A hereto. Those Opinions and Orders dismissed portions of the appeal below as moot. Due to that dismissal Writ of Certiorari is sought.

The opinion of the United States District Court for the Eastern District of Louisiana appears as Appendix B. hereto. That opinion affirmed the Bankruptcy Court.

The Opinions, Orders and Injunctions of the United States Bankruptcy Court for the Eastern District of Louisiana appear as Appendix C hereto.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 9, 1987.

Petitioners timely application for rehearing was denied April 2, 1987 and this Petition for Writ of Certiorari was filed within 90 days of that date.

The Courts Jurisdiction is invoked Pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The sections of the United States Bankruptcy Code comprising Title 11 of the United States Code which this case involves are: 11 U.S.C. 365(d)(4) and 11 U.S.C. 363(m). See Appendix F. for full text.

The sections of the Anti-Injunction Act which this case involves are: 28 U.S.C. 2283. See Appendix F for full text.

STATEMENT OF THE CASE

In the summer of 1983 First Financial Bank (hereinafter "FFB") issued a loan commitment to petitioner to purchase and renovate the Bayou Plaza Hotel formerly the Fountain Bay Club Hotel (hereinafter sometimes the "hotel"). Petitioner purchased the hotel property on September 15, 1983 and contemporaneously granted FFB a mortgage on the buildings and the ground leasehold estate comprising the hotel property. In October of 1984 due to business reverses not relevant in this case, petitioner sought relief under 11 U.S.C. 1101 *et seq.* Petitioner's assets are the hotel buildings, inprovements, movables and the long-term ground lease at the corner of Tulane and Carrollton Avenues, New Orleans, Louisiana.

In March of 1985 FFB moved the bankruptcy court to lift the automatic stay under section 362 of the

Bankruptcy Code to permit FFB to foreclose in state court. The bankruptcy court granted the motion and FFB then filed an executory process (foreclosure) suit against petitioner in the Civil District Court for the Parish of Orleans, State of Louisiana. Petitioner sought a temporary restraining order based upon, inter alia, allegations of fraud. (A civil RICO action based on the same acts allegedly constituting the fraud is pending against FFB in federal court; issue was joined in December of 1986.) After a two day trial where two experts testified, a judgment of preliminary injunction was read, rendered and signed on August 14, 1985 by the state court prohibiting FFB or "anyone acting at its discretion" from alienating any collateral in the hands of FFB and from going forward with the foreclosure auction sale. Petitioner thereby became a state court judgment winner. See Appendix E for full text of the Judgment of Preliminary Injunction. After losing in state court, FFB appealed the judgment to the Louisiana Fourth Circuit Court of Appeals as provided by Article 3612 of the Louisiana Code of Civil Procedure.[1] FFB also returned to bankruptcy court and succeeded in its motion to have petitioner's Chapter 11 converted to a Chapter 7. Jean Hebert Turner was appointed trustee on December 5, 1985; that same day FFB dismissed its appeal in state court.

On February 27, 1986 the lessors under the ground lease purchased by petitioner on September 15, 1983, through their attorneys, issued a letter to petitioner exercising the lessors' remedy under 11 U.S.C. 365(d)(4). The letter recognized the trustee's rejection of the lease under 11 U.S.C. 365(d)(4) and established possession rights under

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[1] F.R.Civ.P. 54(a) provides that a final judgment includes any decree or order "from which an appeal lies."

the lessee in the "non-bankruptcy" estate of petitioner. Petitioner accepted the terms of the lessors' letter and timely exercised the option under the lease as required by the lessors' letter. See Appendix D. for full text of the lessors' letter and petitioner's response.

The next day, February 28, 1986, the trustee filed a motion to reinstate the Bankruptcy Code Sec. 362 automatic stay order and a motion for injunctive relief, which motions were heard by the bankruptcy court on an expedited basis on March 6, 1986 and granted. The trustee's motions specifically sought to restrain and prohibit, all State Court litigation including the foreclosure proceedings. See Appendix C for full text of the March 6, 1986 orders.

On March 10, 1986 an agreement was entered into by the trustee and FFB setting forth the terms and conditions of a proposed trustee's public auction sale whereby FFB agreed to buy the hotel property from the trustee. FFB then filed a motion for injunctive relief with the bankruptcy court which was granted ex parte on March 13, 1986. FFB's motion also sought to prohibit the prosecution of, inter alia, the state court foreclosure proceeding and to allow time for the March 10, 1986 agreement to be fulfilled. See Appendix C for full text of the March 13, 1986 order.

A hearing on the injunction sought by FFB was then held on March 20, 1986 and the bankruptcy court maintained the injunctions prohibiting state court litigation. See Appendix C for full text of the March 20, 1986 orders.

On April 18, 1986 the trustee filed an application to sell petitioner's lease, buildings, improvements and

movables (hotel property) under 11 U.S.C. 363 which, after hearing, was approved by the bankruptcy court by two (2) orders dated June 17, 1986. The bankruptcy court also denied petitioner's motion to dismiss the trustee's application to sell. See Appendix C for full text of the June 17, 1986 orders.

On July 30, 1986, the trustee filed a motion to designate herself as the proper party to ratify acceptance of the lease and exercise the option under the lease; the same lease the lessors had deemed rejected under 11 U.S.C. 365(d)(4) on February 27, 1986. After hearing, the bankruptcy court granted the trustee's motion by order dated August 4, 1986. See Appendix C for full text of the August 4, 1986 order and reasons for judgment.

Petitioner timely opposed all of the aforesaid motions, appealed all of the orders of the bankruptcy court to the district court, and sought a stay pending appeal from the district court. The appeals were given three (3) separate docket numbers in district court. Petitioner's request for a stay pending appeal was denied by both the district court and the Fifth Circuit.

On August 11, 1986, the trustee conducted a public auction sale of petitioner's ground lease, buildings, improvements and movables (hotel property). FFB was permitted to "credit bid" at the auction and was the successful bidder. Then, on August 15, 1986, the trustee and FFB executed an authentic act of sale of the hotel property auctioned by the trustee.

On November 13. 1986 the district court, after consolidating the three appeal's affirmed all of the bankruptcy

court's orders. See Appendix B. for full text of the district court's opinion of November 13, 1986. Petitioner filed its Notice of Appeal of the district court's decision on November 20, 1986. After petitioner filed its brief in the Fifth Circuit, appellees filed Motions to Dismiss Portions of Appeal on the grounds of mootness invoking the provisions of 11 U.S.C. 363(m). The Fifth Circuit granted those motions and denied petitioner's request for rehearing on April 2, 1987. See Appendix A for full text of the fifth Circuit's opinions and orders.

As a result of the injunctions issued by the bankruptcy court and affirmed by the district court, the state court proceedings came to a standstill and FFB ostensibly purchased the hotel property by "credit-bid". FFB remains in possession of the hotel properly to this day. Petitioner remains dispossessed of its lease.

This petition seeks review of the underlying issues in those portions of petitioner's appeal relating to the sale of petitioner's hotel property which were dismissed by the Fifth Circuit on the grounds of mootness. Also at issue in this case is the authority of federal courts, notwithstanding the Anti-injunction Act and judicially-crafted comity principles, to interfere with state court judgments and pending state court proceedings by enjoining ongoing state court litigation.

REASONS FOR ALLOWING THE WRIT

Conflict and confusion exists among the circuit and district courts over how a lease is accepted or rejected under section 365 of the Bankruptcy Code. uncertaintly exists over the meaning of the provisions of 11 U.S.C.

365(d)(4) and 11 U.S.C. 363(m) and the interaction of the legal effects of those statutes upon each other. Confusion exists as to whether and when a federal court can avoid comity principles. Violations of the Anti-Injunction Act (22 U.S.C. 2283) should not engender a benefit.

I. The Lower Court's Decisions Cause Confusion Among the Circuits and Districts Over The Procedure Which Must Be Followed To Accept A Lease Under 11 U.S.C. 365(d)(4).

Under section 365(d)(4) of the Bankruptcy Code, which governs acceptance or rejection of leases or executory contracts, a trustee must file a formal motion to assume a lease or executory contract within 60 days after commencement of a case under 11 U.S.C. 701 *et seq.* (Chapter 7) or conversion of a case from one under 11 U.S.C. 1101 *et seq.* (Chapter 11) to a case under Chapter 7 in order that such lease or executory contract may form part of the bankruptcy estate. Bankruptcy Code section 365(d))1) and (4); Bankruptcy Rules 6006 and 9014; *In re Lovitt,* 757 F.2d 1035 (9th Cir.), *cert. denied* 106 S. Ct. 145 (1985); *In re Tonry,* 724 F.2d 476 (5th Cir. 1984); *In re Treat Fitness Center Inc.,* 60 B.R. 878 (9th Cir. BAP 1986); *In re Spats Restaurants & Saloon,* 64 B.R. 442 (Bkrtcy. D.Nev. 1986); *In re Burns Fabricating Company,* 61 B.R. 955 (Bkrtcy. E.D. Mich. 1986); *In re Tandem Group, Inc.,* 61 B.R. 738 (Bkrtcy. C.D. Cal. 1986); *In re By-Rite Distributing, Inc.* 55 B.R. 740 (D. Utah N.D. 1985); *In re Southwest Aircraft, Inc,* 53 B.R. 805 (Bkrtcy. C.D. 1985); *aff'd* 66 B.R. 121 (9th Cir. BAP 1986); *In re By Rite Distributing, Inc.,* 47 B.R. 660 (Bkrtcy Utah 1985); *In re Kors, Inc.,* 22 B.R. 19 (Bkrtcy. Vt. 1982); *In re Price Chopper Supremarkets, Inc.,* 19 B.R. 462 (Bkrtcy. Cal. 1982). The bankruptcy court may not ignore the strict time limits and has no discretion to extend the time for the trustee's assumption of leases in a Chapter 7 case after the deadline

has passed. *In re Southwest Aircraft, Inc.*, supra; *In re Communications Company of America*, 65 B.R. 581 (S.D.N.Y. 1986); *In re Butcher Shop and Deli of Miami, Inc.* 45 B.R. 239 (Bkrtcy. Fla 1984). Moreover, the lack of express rejection does not constitute assumption and where the trustee neither assumes or rejects the lease within the prescribed period the lease is deemed rejected. *In re Davies*, 27 B.R. 898 (Bkrtcy. N.Y. 1983); *In re Public Ledger*, 62 F.Supp. 1008 (D.C. Pa. 1945).

In spite of the many well reasoned decisions cited above, the Bankruptcy Court for the Eastern District of Louisiana stated that the "jurisprudence interpreting 11 U.S.C. 365(d)(4) has developed into two district lines" and chose to rely on one of its own decisions rendered in June of 1986 citing *In re Curio Shoppers, Inc.*, 55 B.R. 148 (Bkrtcy. D. Conn. 1985) as the authority for its judgment that the trustee adequately assumed the lease. The bankruptcy court is thus *creating* the "tow district lines" of jurisprudence. The district court agreed and the Fifth Circuit avoided the issue by dismissing the appeal. Furthermore, *Curio Shoppes* is not controlling because it is based on reasoning utilizing Connecticut state law and deals with a Chapter 11 case instead of a Chapter 7 case. Moreover, since the conduct described in *Curio Shoppes* and the reasoning of the court in that case are obviously distinguishable, the case is inappropriate to stand for the legal proposition of 11 U.S.C. 365(d)(4) and thus more confusion and conflict is created.

Petitioner submits that the best reasoning of the issue was articulated by the *Lovitt* court, in which case this court denied certiorari, where it was stated:

> Because executory contracts and leases involve future liabilities as well as rights, however, an affirmative act of assumption by the trustee is

required to bring the property into the estate in order to ensure that the estate is not charged with the liabilities except upon due deliberation. *See In re Frazin*, 183 Fed. 28, 32 (2d Cir. 1910); 4A *Collier on Bankruptcy* para. 70.43(1), at 520 (14th ed. 1978). Thus, executory contracts and leases - unlike all other assets - do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption. *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1352 (9th Cir. 1983); *Fletcher v. Surprise*, 180 F. 2d 669, 676 (7th Cir.), *cert. denied* 340 U.S. 824, 71 S.Ct. 58, 95 L.Ed. 605 (1950).

Because rejection of an executory contract is retroactive to the date of the filing of the bankruptcy petition, such a contract never becomes a part of the bankrupt's estate. *In re Tonry, supra*, at 469; *In re Cochise College Park, Inc. supra*, at 1352; *Danning v. Brunswick Corp.*, 466 F.2d 1010, 1012 (9th Cir. 1972), *cert. denied* 409 U.S. 1126, 93 S. Ct. 939, 35 L. Ed. 2d 257 (1973); *Fletcher v. Surprise, supra*, at 676. A bankruptcy court has no jurisdiction over assets outside of the bankrupt's estate, and therefore lacks authority to approve their sale or transfer. *United States v. Neiwirth*, 370 F. Supp. 929, 934 (D.N.J. 1974).

In the present case, it is undisputed that the unexpired leases fall within the purview of section 110(b) and rule 607, and that trustees Galer and Aebig took no action to assume the leases within sixty days of their respective qualification dates. Therefore, both leases were rejected by operation of the statutes and the bankruptcy court was without jurisdiction to enter its order confirming the trustee sale. The district court's holding to this effect is directly supported by *In re Gravure*

Paper & Board Corp., 234 F.2d 928 (3d Cir. 1956), which we cited approvingly in *In re Cochise College Park, Inc., supra*, at 1351 n. 10, 1352, 1356. *Gravure* made clear that once a trustee rejects a lease, he no longer has any right, title or interest in the lease or its proceeds. *Gravure, supra*, at 930, 932. Consequently, the sale of an unassumed lease is a nullity. *Id.*

Cheadle contends that section 110(b) and Rule 607 were not intended to apply to unscheduled leases. We Disagree. The statutory presumption of rejection by the trustee's nonaction within the sixty day period following his qualification is a conclusive presumption. *In re Gravure Paper & Board Corp., supra* at 930; *Fletcher v. Surprise, supra*, at 675-76; *In re Shipley*, 29 B.R. 13, 15 (W.D. Ky. 1983).

The Ninth Circuit Bankruptcy Appellate Panel held unequivocally in *Treat Fitness Center, supra*, that a lease may not be assumed by conduct. The courts of Eastern District of Louisiana have held otherwise which leads back to the uncertainty which existed before the Bankruptcy Amendments and Federal Judgeship Act. The Bankruptcy Court for the Eastern District of Louisiana has erroneously concluded that the jurisprudence of lease rejection cases has developed in two lines and the District Court affirmed the Bankruptcy Court opinion. Petitioner submits that the best description that can be given to the jurisprudence in this area is that there is one well-reasoned line of cases correctly interpreting the legislative history of the provisions of the Bankruptcy Amendments and Federal Judgeship Act, particularly section 365 of the Bankruptcy Code, interspersed with two or three aberrant decisions. Petitioner submits that the aforecited statutes, rules and cases comprise the correct body of law for the proposition that an unexpired lease cannot be assumed by conduct or verbal

declarations and thus the decisions and orders of the courts of the Eastern District of Louisiana create confusion, and are in conflict with other circuits and contrary to the reasoning of the *Lovitt* court where certiorari was denied.

The acts which the court of the Eastern District of Louisiana point to as those which constitute the trustee's assumption of the lease, and which in turn gave rise to ratification of such assumption, are not the type of acts which the Bankruptcy Code deems sufficient to constitute assumption of the lease because the Bankruptcy Code clearly requires that '[t]he trustee shall timely perform all the obligations of the debtor arising from...any unexpired lease of nonresidential property until such time such lease is assumed or rejected..." Bankruptcy Code Sec. 365(d)(3). Thus, the acts of the trustee which supposedly manifest assumption of the lease are *required* anyway and conduct which is required by affirmative, statutory duty cannot by implication be anything more than it is - the performance of statutory duty. To allow the performance of this duty to have, by implication, other legal effects is to set traps for the very third parties the statutes creating the duty were designed and enacted to protect. How will a third party ever know whether the acts of the trustee are being performed merely in the line of duty or whether those very same acts will be used later as the basis for some other legal result? Maintaining the rule of law set forth by the courts of the Eastern District of Louisiana will put back into the law the very uncertainty the revision of Section 365 was designed to eliminate. To permit an inroad in the prescriptive and explicit rules of assumption of unexpired leases "would be to lead us back into the morass of attempting to judge the meaning and import of the conduct and conversations of the parties."*In re Treat Fitness Center, Inc., supra* at 879. Moreover, such holdings create a loophole whereby a trustee's action can have two different

legal meanings and ramifications depending solely upon the trustee's intentions and whims. A trustee will be able to suppress and disguise his or her true intentions by appearing to be only doing his duty. Thereafter, whenever it behooves him, even well pasts the 60 day deadline, declare that his conduct really meant something else (e.g. acceptance or ratification of an unexpired lease) and assert that another legal result should obtain. Should this loophole not be closed, the law of lease assumptions and rejections by trustees and debtors-in-possession will continue to be inherently flawed and available for abuse.

To sum it up, the Ninth and Third Circuits hold that the sale of an unassumed or rejected lease is a nullity whereas the Fifth Circuit's holdings allow the rejection of a lease to be cured *by* subsequent sale of the lease. Private actors must adjust their transactions depending on where their transactions take place even though such transactions are based on a Bankruptcy Code applicable to the entire country. What's even more confusing is that an act that is considered *void* in one circuit is the *cure* in another. A restatement of the clear holding of *Lovitt* is appropriate to eliminate the confusion and potential for abuse and conflict.

II. The Court of Appeals Decision Applying 11 U.S.C. 363(m) Over 11 U.S.C. 365(d)(4) Is Inherently Conflicting

The effect of the adjudications of the Fifth Circuit and the district and bankruptcy court below is that the failure of a bankruptcy trustee to assume a lease pursuant to 11 U.S.C. 365(d)(4) is now an act of omission which can be rectified by resorting to a four part formula which negates the effect of one statute in favor of the effect of another statute whose applicability comes later in time. Under this formula the prescriptiveness of 11 U.S.C.

365(d)(4) is written out of the law and instrumentalism takes the place of the clear meaning of the statute. The intent of Congress is thwarted. This can be demonstrated by the mere articulation of the four part formula employed by the courts below in their adjudications.

First, the party (petitioner) seeking to accept the offer of the contract of lease (Appendix D) by the lessor was enjoined and stayed from litigating in the state courts where petitioner's lease contract and judgment of preliminary injunction would be enforced. Second, instead of recognizing the trustee's rejection of the lease, acceptance by the trustee was ratified by the lower courts by resurrecting the legal proposition that a lease may be accepted by conduct (a principle specifically rejected and indeed the primary reason for the 1984 revision and reenactment of 11 U.S.C. 365(d)(4). Third, the sale of the lease was applied for, conducted and confirmed during the existence of the stay order and injunctions against petitioner, its counsel and partners. And fourth, the provisions of 11 U.S.C. 365(m) were then invoked after the trustee's sale and confirmation thereof to pronounce the case moot thereby foreclosing challenges to the trustee's sale of the lease and failure to timely comply with 11 U.S.C. 365(d)(4). Thus, 11 U.S.C. 365(d)(4) is neatly circumvented. The negligent trustee is freed of responsibility for his error and omission and failure of duty under one rule (11 U.S.C. 365(d)(4) by resort to another rule (11 U.S.C. 363(m)). The burden of the trustee is lifted to become the loss of others without due process. Rights under the lease are shifted. A dispossession takes when, after the lessor exercises his remedy under 11 U.S.C. 365(d)(4) and contracts with a third party, the trustee's title to the lease is deemed superior under 11 U.S.C. 363(m) because a sale took place even without a finding of good faith on the part of the purchaser.

Ever since the twelfth century, it has been recogniz-

ed that a prior possessor wrongfully dispossessed of incorporeal rights could recover against the present possessor merely by proof of wrongful dispossession and without the necessity of proving a better title. *See,* Franesco Ruffini, *L'Actio Spolii* (Turin, 1889), P. 327. The action was available even to one who was himself wrongfully in possession. To take the most extreme case, if A wrongfully dispossessed B, and then in retaliation B wrongfully dispossessed A, A would be entitled to a judicial decree restoring him to possession. The principle was that a person out of possession who could prove he was wrongfully dispossessed should have a preliminary judicial remedy of restitution before anything else concerning the matter was considered, and he was not to be benefited by the taking of the law into his own hands. Self-help and bad faith was thus discountenance.

In this case, the rights petitioner obtained by the lessors exercise of his remedy under 11 U.S.C. 365(d)(4) were dispossessed by the trustee's sale and application the provisions of 11 U.S.C. 363(m) which, by its terms, makes no provisions for restitution other than implicitly by requiring good faith on the part of purchaser. Presumably a finding of lack of good faith on the purchaser's part would require some form of rescision and restitution. It should be noted that none of the lower courts made the required finding of good faith. Thus 11 U.S.C. 363(m) although held to supersede 11 U.S.C. 365(d)(4) was not fully satisfied which in turn creates even more confusion.

The adjudications below concerning these statutes discourage transaction in general because an actor can no longer determine that the use of the prescriptions and formalities of 11 U.S.C. 365(d)(4) guarantees the execution of

his intentions. This outcome chills private activity by subordinating the 11 U.S.C. 365(d)(4) remedy and turning the clear meaning of the words of the remedy into another statutory roulette wheel. This was not the intent of Congress. Congress sought greater certainty in enacting the modifications to section 365(d)(4) of the Bankruptcy Code. Put another way, the underlying goal of Congress was to improve the degree to which section 365(d)(4) has the quality of "ruleness". The degree of the quality of "ruleness" of a legal proposition was termed "formal realizability" in R. von Ihering's *Spirit of Roman Law* according to Professor Duncan Kennedy in his article "Form and Substance in Private Law Adjudications", 89 Harv. L. Rev. 1685 (1976). Prof. Kennedy classifies "formal realizability" as the firsts dimension of legal form within the jurisprudence of rules and then states the two social virtues of formally realizable rules thusly:

> It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty. The two are distinct but overlapping. Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule. These range from corruption to political bias. Their use is seen as an evil in itself, quite apart from their impact on private activity.
>
> Certainty on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the point of view of the state, this increases the likelihood that private activity will follow a desired pattern. From the

point of view of the citizenry, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe.

Petitioner submits that failure to address this uncertainty would increase the risk of arbitrariness, further uncertainty and sporadic legal catastrophes.

III. The Court of Appeals Decision Applying 11 U.S.C. 363(m) Over 11 U.S.C. 365(d)(4) During The Existence of An Injunction And Stay Order Violates The Anti-Injunction Act, Interferes With The Proceedings And Final Judgments Of A State Court And Avoids The Principles of *Younger* and *Pennzoil*.

The judgments of the courts below sanction an unprecedented intrusion by a federal court into ongoing state court proceedings, opening a yawning breach in the wall of statutes and judicial doctrines enacted by Congress and this Court as a barrier against just such intrusions. The bankruptcy and district court in the Eastern District of Louisiana has been given carte blanche to supplant the courts of Louisiana and to exercise continuing supervision over state foreclosure proceedings preventing petitioner, on pain of contempt, from pursuing any remedy in any Louisiana tribunal to protect its existing and - unless and until reversed - wholly lawful Louisiana judgment.

The rulings below surely warrant review because they invite all losing state court litigants to invent new maneuvers for side-stepping ongoing state court proceedings. The rulings create a no-man's land where *none* of the relevant comity statutes and rules is operative - a jurisdictional darkling plan where litigants shanghaied from state courts clash by night. At a minimum, the decisions below authorize every foreclosing creditor whose proceedings are enjoined to bypass the state courts and mount

a collateral repossession attack in federal court. The courts below created for the first time, a right enforceable in a federal court, to a superceding repossession action the success of which is guaranteed by injunctions which violate the Anti-Injunction Act. Plainly stated, after petitioner suceeded in state court it was pilloried so that the repossession of its property could be otherwise accomplished in federal court although FFB had no constitutional right to a federal rather than a state court action.

The Anti-Injunction Act, in force since 1793, provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. 2283. The Act is a linchpin of federal-state relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286, (1970). The "lines of demarcation"contained in the Act are designed to permit each court system to function "independently of the other with ultimate review in this Court of the federal questions raised in either system." *Id.* The effectiveness of the Act, and thus the integrity of the dual court system, are seriously threatened by the decisions below in this case. The "national policy forbidding federal courts to stay on enjoin state proceedings except under special circumstances" is eviscerated when injunctions and stays are used as bridges over a legal chasm caused by the trustee's failure of duty to properly assume under 11 U.S.C. 365(d)(4) *Younger v. Harris,* 401 U.S. 37, 41 (1971); *Pennzoil v. Texaco,* 107 S.Ct. 1519 (1987).

The impropriety of the injunctions and stay order, and trustee sale during same is amplified when viewed in light of the fact that the state court foreclosure proceeding

found its way to state court because the bankruptcy court lifted the automatic stay under Sec. 362 of the Bankruptcy Code to permit the state court proceedings - the very proceedings which were later enjoined presumably because petitioner became a state court judgment winner of a preliminary injunction against foreclosure. The point of the *Younger/Pennzoil* doctrine is to assure that the use of state courts for the effectuation of the state's policies and judicial interests not be subject to federal interference, except in narrowly defined extraordinary circumstances. For the bankruptcy court to first refer the foreclosure action to state court, then enjoin and stay those proceedings and permit the sale of the same property under 11 U.S.C. 363, and finally for the whole matter of the sale to be declared moot under 11 U.S.C. 363(m) is to make a mockery of 11 U.S.C. 365(d)(4); 28 U.S.C. 2283 and the *Younger/Pennzoil* doctrine. But for the injunction and stay order, the state court foreclosure proceedings would have been completed and would have restored petitioner's possession of the hotel property and the intentions and rights of the parties (Appendix D) would not have been abducted.

The state statute books are stuffed with procedural and structural rules governing the processing of private disputes through the state trial and appellate courts, and the law reporters are filled with cases attacking the fairness and reasonableness of such rules and alleging that their enforcement would work irreparable harm. Under the rulings below, such issues are easy prey to federal collateral attack during ongoing state proceedings. All that is needed is a deliberate bypass of the state courts, an injunction here, a stay order there, a bit of artful pleadings and voila, a "manufactured" result is achieved albeit contrary to that which would have developed in state court. The legal chasm between the dates on which 11 U.S.C. 365(d)(4) and 11 U.S.C. 363(m) became effective is ignored, indeed filled in, by enjoining the state court porceedings *after* such

proceedings had been authorized in the first place by the federal courts and had proceeded to judgment in favor of petitioner. Thus every litigant in these circumstance is given a "free bite" in state court because the litigant now knows that a collateral federal action utilizing the four part formula outlined above can be successfully maintained under a guarantee of success in the form of an injunction and stay order. Deliberate bypass of the state's judicial system is encouraged and rewarded. 11 U.S.C. 363(m) should not become a safe harbor for those creditors who lose in state court and trustees who fail their duty under 11 U.S.C. 365(d)(4) and to force the loss upon the state court judgment winner by the use of injunctions and stay orders violative of the Anti-Injunction Act and comity rules is a form of domination which should be strongly discouraged.

The consequences of the rulings and interpretations of the courts below are many and various and all undersirable. A loophole is opened where none was thought possible. The danger of fragmented jurisprudence increases. Uncertainty, intrusiveness and invasion prevails. The risk of bias and favoritism increases and the clear meaning of the words of the statutes involved become ambiguous. Objectivity and uniformity give way to subjective and inconsistent jurisprudence and adjudications based on instrumental rationality devoid of generality and stability and the freedom of private actors to contract is restricted because transaction in general is discouraged. The clear reasoning of *Lovitt* should be reaffirmed and strengthened just as *Pennzoil* reaffirmed and strengthened *Younger.*

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Limited Partnership

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
FILED
MARCH 9, 1987

No. 86-3836

IN THE MATTER OF: TULANE HOTEL INVESTORS LIMITED PARTNERSHIP, ET AL.,

Movants-Appellants.

Appeal from the United States District Court
For the Eastern District of Louisiana

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of appellees to dismiss portions of the appeal are **GRANTED.** 11 U.S.C. § 363(m) deprives this Court of power to grant the relief sought by appellants, i.e. declaring the trustee's sale a nullity **ab initio,** because appellants did not obtain a stay pending appeal. **See Matter of Bleaufontaine, Inc.,** 634 F.2d 1383 (5th Cir. 1981). That a leasehold in addition to a sale of property is involved does not change this result. **In re Exennium, Inc.,** 715 F.2d 1401 (9th Cir. 1983). Consequently, the appeals of district court orders docketed as Nos. 86-3428 and 86-3607 are **DISMISSED** as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
APR 2 1987

No. 86-3836

IN THE MATTER OF:

TULANE HOTEL INVESTORS LIMITED PARTNERSHIP, ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for reconsideration of this Court's order of March 9, 1987 which dismissed in detail portions of the appeal is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP

FILED
NOV 13 1986

NOS. 86-2457
86-3428
86-3607

SECTION "A"

ORDER & REASONS

This matter came before the Court for oral argument on appeals pending from the bankruptcy court's orders of March 6 and 20, 1986, June 17, 1986, and August 4, 1986, assigned Civil Actions No. 86-2457, 86-3428 and 86-3607respectively. although the partiesfiled voluminous briefs in respect of these appeals, the briefs are largely repetitive of prior submissions to this Court and raise issues previously addressed by this Court in its Order and Reasons of August 7, 1986 in Civil Action No. 86-3428, a copy of which is attached hereto as Appendix "A". [1/] All three appeals contain overlapping issues and thus are addressed together in this Order and Reasons.

DATE OF ENTRY NOV 13 1986

[1/] The August 7, 1986 Order and Reasons was signed by Judge Arceneaux for Judge Schwartz, but the Order and Reasons was prepared by Judge Schwartz and he is responsible for its content.

Specifically, Civil Action No. 86-2457 concerns the bankruptcy court's March 6 and 20, 1986 orders staying federal and state court proceedings against the debtor partnership. To the extent this appeal seeks reconsideration of matter's previously ruled upon by this Court, see Appellant's Brief pp. 2-3, this Court declines to do so. The Court finds distinguishable from this case the questions before the Fifth Circuit in *Pye v. Dept. of Transp.*, 513 F.2d 290 (5th Cir. 1975), cited by Appellant. In *Pye*, plaintiff challenged the propriety of state land condemnation preceedings against certain of his property, which questions the Fifth Circuit found identical to issues plaintiff himself initially litigated in state court. *Pye* did not address the powers of the bankruptcy court, but rather addressed what the Fifth Circuit discerned as an improper attempt to relitigate matters barred by res judicata.[2]

Moreover, F.R.C.P. Rule 65 on Injuctions does not apply to the imposition of a stay established by 11 U.S.C. § 362, and Appellant's contentions regarding noncompliance with Rule 65 are therefore without merit.

Civil Action No. 86-3428 challenges the bankruptcy court's order of June 17, 1986 modifying its stay to permit the sale of certain property of the debtor. Appellant filed no brief in respect of this appeal, no doubt because of the overlapping issues contained in the three appeals. The propriety of the June 17 order was squarely addressed in this Court's August 7, 1986 Order and Reasons.

The Court further observes that the bankruptcy court modified its stay to permit sale of the debtor's property by the trustee. The state court issued its preliminary

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[2] See also pages 4-5 of this Court's August Order and Reasons, addressing other aspects of the permissibility of the bankruptcy court's action in light of the state court proceedings.

injunction against First Financial Bank. First Financial is not selling the property. Thus, assuming argumento the state court preliminary injunction were still viable, this Court would find no actual conflict between the actions of the state and federal court in this regard.

The remaining appeal, Civil Action No. 86-3607, challenges the bankruptcy court's order of August 4, 1986, pursuant to which the bankruptcy court granted the trustee's motion to ratify the lease. This Court previously discussed the Appellant's lack of standing to challenge the ratification.[3]

For the foregoing reasons, the orders of the bankruptcy court are hereby AFFIRMED.

New Orleans, Louisiana, this **13th** day of November, 1986.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

[3] See pages 5-6 of the August 7 Order and Reasons, citing cases. The remaining appeal concerns the bankruptcy court's order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP

FILED
AUG 7 1986

NOS. 86-3428

SECTION "A"

ORDER & REASONS

This matter came before the Court pursuant to Bankruptcy Rule 8005 on motion of debtor, Tulane Hotel Investors Limited Partnership, for a stay of the order of the United States Bankruptcy Court for the Eastern District of Louisiana ("bankruptcy court") dated June 17, 1986 approving the application of the trustee of the estate of the partnership ("trustee") for sale of certain of debtor's property pending appeal of said order. Debtor's request ofr stay was denied in the United States Bankruptcy Court. For the reasons which follow, the Court finding that the relevant factors indicate that a stay should not be imposed, the motion is DENIED.

In determining whether a motion for a stay of judgment or order of the Bankruptcy Court will be granted, the relevant factors are: likelihood that the parties seeking the stay will be successful on the merits, whether the moving party will be subject to irreparable injury if the stay is not granted; whether the granting of the stay will cause irreparable harm to other interested parties; and whether the granting of the stay will have a detrimental effect on the public interest. *In Re Intermet Realty Partnership,* 27 B.R. 938 (Bkrtcy. E.D. Pa. 1983); *In Re Dobslaw,* 20 B.R. 922 (Bkrtcy. E.D. Pa. 1982); *In Re Richardson,* 15 B.R. 930

DATE OF ENTRY AUG 7 1986

(Bkrtcy E.D. Pa. 1981); *In Re Tolco Properties, Inc.*, 6 B.R. 490 (Bkrtcy. E.D. Va. 1980). Additionally, the granting of a stay in bankruptcy proceedings id discretionary. *In Re Smith*, 324 B.R. 144 (Bkrtcy. D. Vt. 1983); *In Re Neisner Brothers, Inc.*, 10 B.R. 299 (Bkrtcy. S.D. NY 1981). In this case, we find that none of the relevant factors weigh in favor of the imposition of a stay. We address each of the criteria separately.

Turning first to the relative likelihood that the parties seeking a stay will be successful on the merits, we note that the movants herein are attacking a sale ordered by the bankruptcy court based on allegations that the bankruptcy court lacked jurisdiction to order a sale of all or part of the property included in the sale order and that some or all of the property ordered sold was disclaimed from the bankrupt estate.[1]

The factual basis of this allegation is the fact that the bankruptcy court in its Findings of Fact and Conclusions of Law of March 21, 1985, and the Judgment of March 27, 1985 issued pursuant thereto, modified the automatic stay imposed by 11 U.S.C. § 362(a). That court stated: "The automatic stay will be modified to permit commencement and prosecution of foreclosure against the property known as the Bayou Plaza Hotel, subject to claims for administrative expenses herein, and exercise of the rights of First Finantial under the pledge of the Certificates of Deposit as reflected in Paragraph 7 of the Findings of Fact. " Bankruptcy Record, Findings of Fact and Conclusions of Law at p. 8; Judgment of March 21, 1985 at

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[1] The claims asserted herein and the arguments in support thereof are virtually identical in every respect to those asserted in the motion for a temporary restraining order previously rejected on procedural grounds by this Court in its order of July 23, 1986. Accordingly, we have had an opportunity to study these asertions previously.

p. 2. A review of the record in the bankruptcy court reveals that as a matter of fact the bankruptcy court did not disclaim the property in question, but rather modified the automatic stay to alow the foreclosure. Accordingly, the only question as to the bankrupcty court's jurisdiction relates to whether or not the bankruptcy court had jurisdiction to reinstate the automatic stay after having lifted it. Therefore, the question presented is whether a bankruptcy court, having entered an order which lifted the automatic stay, has the authority to modify such an order. In *In Re Prime, Inc.*, 26 B.R. 556, 558 (Bkrtcy. W.D. Mo. 1983), the court held that a bankruptcy court had such authority. *Cf., also, U.S. Swift and Copany,* 286 U.S. 106, 52 S.Ct.460 (1932)(discussing bankruptcy courts as courts of equity). Additionally, we note that bankruptcy courts regularly reinstitute automatic stays where conditions are appropriate. *In Re Prime, Inc., supra; In Re Walker,* 3 B.R. 213 (Bkrtcy. W.D. Va. 1980); *Memphis Bank and Trust Company v. Brooks,* 10 B.R. 306 (Bkrtcy. W.D. 1981); *Cf. In Re Durkalec,* 21 B.R. 618 (Bkrtcy. E.D. Pa. 1982). Finally, we note that a bankruptcy court retains jurisdiction over the property even where the automatic stay has been lifted. *In Re Kash and Karry Wholesale, Inc.,* 28 B.R. 66 (Bkrtcy. D. S.C. 1982). Therefore, we find that the bankruptcy court had jurisdiction to reimpose the stay.

However, the movants herein also urge cases which make reference to the doctrine of abstention.[2] However, the doctrine of abstention requires a balancing of such questions as whether or not the particular controversy involves unsettled questions of state law, comity and judicial economy. *Cf. 951 Plymouth Restaurants, Inc. v. Pemberton Pub, Inc.,* 16 B.R. 275 (Bkrtcy. D. Mass. 1981) In this case,

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[2] Of course, in order to "abstain," a bankruptcy court must have jurisdiction in the first instance. Therefore, one reaches the question of abstention only where there is jurisdiction.

after proceedings on the foreclosure were begun in state court, certain of the limited partners sought and obtained a preliminary injunction from another state court. Faced with the delay and uncertainty entailled thereby and the fact that only certain of the parties were before state courts, the bankruptcy court decided to reinstate the stay which it had previously lifted. Given that the bankruptcy court was faced with an evaluation of the effect of these factors on the orderly administration of the estate, this Court does not feel that an effort to overrule this determination has a substantial likelihood of success.[3]

We also note that it appears from the record that the proceedings in the state which resulted in a preliminary injunction were abandoned. First, there appears to be nothing in the record to indicate that, having obtained a preliminary injunction, the movants proceeded with the action in the state court or made an effort to obtain therein any type of permanent injunctive relief. Second, the fact that the sheriff, having seized the property for the purpose of a sheriff's sale, did not attempt to collect any rents or revenues from the property, as mandated by Article 326 of the Louisiana Civil Code, C.C. Art. 326, is also indicative of an abandonment of the state proceedings. Indeed, the sheriff's failure to exercise these rights in highlighted by its contrast to the active operation of the hotel, payment of its debts and collection of its revenues performed by the trustee. *See, infra,* Discussion of Acts of Trustee. We find this abandonment to be particularly important with regard to the issue of abstention since a failure of anyone to pursue the action in which the preliminary injunction was

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[3] We also note that, contrary to movant's assertions, the reimposition of the stay and the bankruptcy court's order allowing the trustee to sell the property in question are not inconsistent with the state court injunction since that injunction was against First Financial Bank and not against the trustee.

obtained amounts to an abandoment of the suit, a situation which would frustrate an orderly administration of the estate. Indeed, taken to its furthest extreme, the movants' abstention argument would require the bankruptcy court to keep this matter open and unresolved forever.

Turning to the movant's allegations that the property in question was disclaimed, the only arguably colorable allegation made by the movants with regard to a possible disclaimer or rejection of property by the bankruptcy court is their allegation that the ground lease was automatically rejected because it was not expressly assumed by the trustee within the sixty day period fixed by 11 U.S.C. § 365. However, the movants lack standing to assert that the lease has been breached by a rejection since the automatic rejection is the lessor's remedy and not available to the debtor. *See In Re Flexipak, Inc.*, 49 B.R. 641 (Bkrtcy. S.D. N.Y. 1985); *cf. Larkins v. Sills*, 377 F.2d 1 (5th Cir. 1967) (discussing the predecessor statute). Additionally, even if the movants had standing to assert a rejection of the lease, "[s]ince the sixty day termination rule is for the benefit of lessors, they can, presumably, waive its application ...." *Flexipak, supra; In Re T.F.P. Resources*, 13 B.C.D. 1104, 1105 (Bkrtcy. S.D. N.Y. 1985). Here, a review of the record and the evidence adduced at the hearing before Judge Kingsmill on August 1, 1986 indicate that the trustee has continued to operate the hotel, has paid monthly lease obligations, paid taxes and insurance for the benefit of the ground lessor, negotiated for the private sale of the leasehold and advertised the public auction sale of the leasehold all with the knowledge and acquiescence of the lessor. *See, e.g.*, Bankruptcy Record, Findings of Fact 4, Order of August 4, 1986. Additionally, although not in itself dispositive, the lessor testified at the August 2, 1986 hearing that at not time has he regarded the lease as other than in full force and effect. Thus, the record and the evidence indicate that, even if rejected, such a waiver has

in fact occurred.

Therefore, the bankruptcy court having had jurisdiction to reimpose the stay, albeit, perhaps, not exclusive jurisdiction, *See In Re Calabria*, 5 B.R. 73 (Bkrtcy. D. Conn. 1980) (discussing bankruptcy courts jurisdiction); *cf. In Re Desmarais*, 33 B.R. 27 (Bkrtcy. D. Me. 1983) (stating that a bankruptcy court in similar circumstances loses exclusive, but retains concurrent, jurisdiction) and there being specific articulable reasons for the bankruptcy court to have declined to abstain from an exercise of jurisdiction, as well as the fact that the movants' allegations that the property in question was disclaimed by the estate is without any substantiation whatsoever in the record, we find that there is not sufficient likehood of success to warrant a stay of the sale.

Turning to the second prong of the test for determining whether or not to stay a judgment order, we note that there is no irreparable harm to the movant. First, the bankruptcy court has ruled, in an order that was not timely appealed and, therefore, final, Bankruptcy Record, Concludes of Law at p. 8, "[t]he Debtors have no equity in the Property known as the Bayou Plaza Hotel, or the Certificates of Deposit as reflected in Exhibit C-18 (a), which property is not necessary to effective reorganization." Conswquently, it is difficult to see how they can be harmed by the sale of the property. However, assuming *arguendo* that the movants have some interest in the granting of this stay, they will suffer no irreparable harm. Not only will the stay result in a certain amount of money being applied to the partnership's secured creditors, bbut pursuant to the settlement entered into between the trustee and First Financial Bank, providing for a guaranteed minimum bid, the estate will receive a minimum benefit of $150,000.00.

Conversely, granting the stay could cause a certain

degree of harm to other creditors. In this case, notices have been published and the estate has incurred a certian amount of expense in connection with the sale. In the event such a stay were later vacated, the estate would have to make such payments a second time. Additionally, pursuant to a settlement agreement entered into by the trustee and First Financial Bank, the estate will be benefited by an amount of at least $150,000 by this sale. A stay of the sale order could result in the collapse of such an agreement to the detriment of the estate and, accordingly, the estate's creditors. Additionally, the record indicates that the hotel is currently being operated at a loss. Its continued operation is not in the best interest of the creditor's of the estate. Accordingly, the granting of a stay would cause severe, if not irreparable, harm to other interested parties.[4]

Finally, turning to the question of whether the granting of a stay will have a detrimental effect on the public interest, it is clear that a sale of the property in question will facilitate the liquidation of the limited partnership. It is also clear that the sale will make additional funds available to the estate's creditors. Therefore, the sale will contribute to the quick and orderly termination of this litigation. It will also help speed the resolution of related state court proceedings. Therefore rather than having a detrimental effect on the public interest, the completion of the sale ordered by the bankruptcy court will have an ameliorative effect on the federal and state court actions invilving the parties in this case. Consequently, it appears that denial of the stay, rather than its granting, will serve the public interest.

In light of the foregoing, the movants having a small

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[4] The harm is particularly severe in this case because of the limited asets of the estate and the small likelihood that any funds lost at the present time can be recouped in the future.

likelihood of success on the merits, the moving parties not being subject to irreparable injury if the stay is not granted, the granting of the stay having no detrimental effect on the public interest and the granting of the stay having a severe, if not irreparable, detrimental effect on other interested parties, the motion for stay of the order of sale entered by the bankruptcy court on June 17, 1986 is DENIED.

New Orleans, Louisiana, this 7th day of August, 1986.

/s/ illegible

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

AMENDED
MINUTE ENTRY
KINGSMILL, J.
MARCH 6, 1986

IN THE MATTER OF
TULANE HOTEL INVESTORS — NUMBER 84-02145-K

DEBTOR — REORGANIZATION CHAPTER 11

The Court's Minute Entry and Order of March 6, 1986 is amended to read as follows:

This matter came before the Court this date as an expedited hearing on the following:

1) Trustee's rule for possession and/or adjudication of reasonable rent: P-160;

2) Trustee's motion to reinstate automatic stay: P-161;

3) Trustee's motion for injuctive relief: P-163;

4) Debtor's motion to disqualify trustee and attorney for trustee and to determine standing of trustee to settle claims: P-164.

5) Trustee's motion to dismiss debtor's motion to disqualify trustee and attorney for trustee: P- .

(MINUTES OF HEARING AND LIST OF APPEARANCES TAKEN BY KAREN FRAZER OF ALLEMAN & ASSOCIATES, INC.)

Considering the arguments of counsel, the evidence presented, and the record herein,

IT IS ORDERED that the motion of Tulane Hotel Investors to disqualify trustee and attorney for trustee be and it hereby is DENIED as there were no grounds for disqualification.

IT IS FURTHER ORDERED that there is to be no interference with the administration of this estate.

IT IS FURTHER ORDERED that any and all parties and counsel be and they are hereby RESTRAINED AND ENJOINED from commencement and/or the debtor estate in state and federal courts pending further order of this Court.

The Court will review the record and the memoranda of counsel ans taken the other matters under advisement.

New Orleans, Louisiana, March 6, 1986.

/s/T. H. Kingsmill, Jr.

T. H. KINGSMILL, JR.
BANKRUPTCY JUDGE

TRUE COPY

Mar 13, 1986

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF:	
TULANE HOTEL INVESTORS	CASE NO.
LIMITED PARTNERSHIP	84-02145-K
DEBTOR	CHAPTER 11

* * * * * * * * * *

ORDER

Considering the foregoing verified Motion for Injuctive Relief, and the Court being satisfied that the estate of Tulane Hotel Investors Limited Partnership as well as First Financial Bank, F.S.B. will suffer immediate irreparable harm before notice can be served on the Defendants and a hearing had for a preliminary injunction,

IT IS HEREBY ORDERED that a tempory restraining order issue restraining and enjoining the proseuction of the Petition for Intervention by Tulane Hotel Investors Corporation, Edmond G. Miranne, Jr., Barry Trinchard, Norman Parent or any partner or guarantor of the Debtor; and further restraining and enjoining James F. Quaid, Edmond G. Miranne, Jr., Barry Trinchard, Norman Parent, any partner of the Debtor or counsel acting without this Court's authority from proceeding to prosecute the Object To Enrolling Counsel of Record and the Motion for Citation for Contempt of Court for Violating Preliminary Injunction or any similar state court motion the effect of which to interfere or impede the efforts of the Bank and the Trustee to settle, compromise and/or transfer property of the Debtor to the Bank and seek approval of this Court for such settlement, compromise and/or transfer.

IT IS FURTHER ORDERED that this order shall remain in force and effect until the **20th** day of **MARCH**, 1986, at **11:15 a.m.**, o'clock, unless further extended by this Court;

IT IS FURTHER ORDERED that Tulane Hotel Investors Corporation, Edmond G. Miranne, Jr., Barry Trinchard, Norman Parent and James F. Quaid appear and show cause of the **20th** day of **March**, 1986, at **11:15** o'clock **A.M.** in Room C-104, U.S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana, why a preliminary injunction in the form and substance of the temporary restraining order should not issue.

SO ORDERED, this **13th** day of **MARCH**, 1986, at **3:05** o'clock **P.M.** at New Orleans, Louisiana.

/s/T. H. Kingsmill, Jr.

T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

TRUE COPY

Mar 13, 1986

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
KINGSMILL, J.
MARCH 20, 1986

IN THE MATTER OF
TULANE HOTEL INVESTORS — NUMBER 84-02145-K

DEBTOR — REORGANIZATION CHAPTER 11

This matter came before the Court this date as an expedited hearing on the motion of First Financial Bank for injunctive relief and as an expedited hearing on the motion of the trustee for contempt.

PRESENT:

EMILE L. TURNER, JR.,
Attorney for Trustee

BETTY F. MULLIN,
Attorney for First Financial Bank

ROBERT G. STASSI,
Attorney for Debtor

JAMES F. QUAID,
Pro se

EDMOND G. MIRANNE, JR.

EDMOND G. MIRANNE, SR.

(EXHIBITS SUBMITTED ARE ATTACHED HERETO)

The Court heard the arguments of counsel, the testimony of the witnesses and the evidence presented; and considering same,

IT IS ORDERED that the motive of Jean H. Turner Trustee, heard on March 6, 1986 for reinstatement of the automatic stay be and it hereby GRANTED.

IT IS FURTHER ORDERED that the stay afforded by 11 U.S.C. § 362 be and it hereby is REINSTATED.

IT IS FURTHER ORDERED that the motion of First Financial Bank for injunctive relief be and it hereby is GRANTED.

IT IS FURTHER ORDERED that all counsel and parties including but not limited to Edmond G. Stassi, Barry Trinchard, Norman A. Parent and any and all intervenors or partners of Tulane Hotel Investors be and they are hereby ENJOINED AND RESTRAINED from making any action whatsoever that may interfere with the administration of this estate and from participating in any litigation in state court.

IT IS FURTHER ORDERED that all state court proceedings be and they are hereby ENJOINED.

Counsel are directed to appear for state court hearing on March 21, 1986 so as not to show any disrespect for that court and to inform the state court of the results of this proceeding.

The parties have their individuals rights but cannot intefere with the rights of the debtor.

Counsel for the debtor and counsel for the trustee are to confer in an attempt to determine fair rental arrangements for the space occupied on debtor's premises. If there are questions about back remuneration, the Court will entertain appropriate motions.

The Court will review the memorandum filed by Mr. Quaid and will take the trustee's motion for contempt under advisement.

New Orleans, Louisiana, March 20, 1986.

/s/ T. H. Kingsmill, Jr.

T. H. KINGSMILL, JR.
BANKRUPTCY JUDGE

TRUE COPY

Mar 25 1986

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:
TULANE HOTEL INVESTORS LIMITED PARTNERSHIP
DEBTOR

CASE NO. 84-02145-K
CHAPTER 11
CONVERTED TO CHAPTER 7

* * * * * * * * * * * *

On the 16th day of June, 1986 came on for hearing the Motion To Dismiss and Object To Trustee's Application For Authority To Sell filed by the Debtor, Tulane Hotel Investors Limited Partnership ("the Partnership").

APPEARANCES:

Emile L. Turner, Jr. - Attorney for Trustee, Jean Hebert Turner, ("the Trustee")

Lee C. Grevemberg - Attorney for the Partnership

After considering the law and the evidence as well as the argument of counsel, the Court hereby finds that:

1. This Court's Judgment and findings of Fact and Conclusions of Law dated March 21, 1985 ("the March 21, 1985 Judgment") which granted the Motion To Modify Stay by First Financial Bank ("the Bank"), permitting the Bank to proceed with foreclosure against the property known as the Bayou Plaza Hotel ("the Hotel"), did not divest this Court of jurisdiction over the Hotel or exclude the Hotel from the estate of the Partnership;

2. The Court has continuing jurisdiction over the Hotel, which jurisdiction extends to the determination in accordance with 11 U.S.C. §363(d), of the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances;

3. In accordance with the provisions of 11 U.S.C §363(d), the Court finds that the relief sought in the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances is not inconsistent with the relief granted to the Bank in accordance with the March 21, 1985 Judgment;

4. The Court finds that it should not abstain from determining the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances, because the Application is a core proceeding in accordance with the provisions of 28 U.S.C. §157, subsections (A)(N) and (O).

ACCORDINGLY,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion To Dismiss And Objection To Trustee's Application For Authority To Sell is hereby DENIED.

SO ORDERED, this 17th day of June, at New Orleans, Louisiana.

/s/ T. H. Kingsmill, Jr.

U. S. BANKRUPTCY JUDGE

TRUE COPY
AUG 4, 1986

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:
TULANE HOTEL INVESTORS LIMITED PARTNERSHIP
DEBTOR

CASE NO. 84-02145-K
CHAPTER 11
CONVERTED TO CHAPTER 7

* * * * * * * * * * *

ORDER AUTHORIZING EMPLOYMENT OF AUCTIONEER AND SALE BY PUBLIC AUCTION OF PRORERTY FREE AND CLEAR OF ANY AND ALL INTERESTS, CLAIMS, LEINS, MORTGAGES AND ENCUMBRANCES

On the 16th day of June, 1986 came on for hearing the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages Ands Encumbrances.

APPEARANCES:

Emile L. Turner, Jr. - Attorney for Jean Hebert Turner, Trustee (herinafter "the Trustee")

J. Michael Dendy - Attorney for Walter Brown

Edmund G. Miranne, Jr. - Attorney for Edmond G. Miranne, Jr. and Edmond G. Miranne, Sr.

Lee C. Grevemberg - Attorney for Tulane Hotel Investors Corporation, Tulane Hotel Investors Limited Partnership, Barry Trinchard, and Norman Parent

Alwynn J. Cronvich - Attorney for McCann Electronics

It appearing that all creditors and parties in interest have been given the required notice, opportunity to object and be heard; further that this Court has determined that the sale is in the best interest of the estate and teh public auction represents the best method of obtaining the best possible price under teh circumstances of the property being sold, therefore:

IT IS HEREBY ORDERED that:

1) The Trustee is authorized to sell at public auction the property known as the Bayou Plaza Hotel, as more particularly described in Exhibits "A" and "B" attached hereto, less and except the property described in Exhibit "C" attached hereto;

2) The sale will be free and clear of any and all interests, claims, liens, mortgages and encumbrances including without limitation those items detailed on Exhibit "D" attached hereto (with exception made for those certain chattel mortgages as shown on Exhibit "C");

3) The Trustee is authorized to employ Marvin Kessler of Lemarco and Associates as auctioneer at the public auction sale, said auctioneer to receive $3,000.00 as compensation for services rendered plus the reimbursement of expenses not to exceed $5,000.00, which amounts shall be paid by the Bank after completion of the public auction sale;

4) The terms of the sale by public auction shall be (a) minimum opening bid of $5,250,000.00, which sum equals seventy-five (75%) percent of the appraised value

of the property as found by the Court in its Judgment signed June 9, 1986; (b) the minimum opening bid shall be guaranteed by the Bank upon the terms and conditions as set forth in the letter agreement as shown in Exhibit "E" attached hereto, which terms and conditions are approved by the Court; (c) the Bank's minimum bid may be as a credit against the secured indebtedness in favor of the Bank; and (d) all bids other than that of the Bank shall be cash payable by ten (10%) percent nonrefundable deposit at time of auction and balance payable not later than thirty (30) days from auction date.

5) In the event that the minimum bid by the Bank is exceeded, then the Trustee is authorized to distribute the sale proceeds first retaining the net amount of $150,000.00 for the estate; secondly, the balance of the proceeds shall be paid to the Bank in whole or partial payment of its secured claim;

6) Upon completion of the sale to the successful bidder, and receipt of the purchase parice, Trustee is authorized and directed to execute and deliver a deed conveying unto the successful bidder the property as outlined in Paragraphs (1) and (2) *supra* and any and all other documents necessary to comply with the terms and conditions of the letter agreement attached as Exhibit "E";

7) Upon certification by the Trustee that the sale by public auction and conveyance to the successful bidder is complete, the Recorder of Mortgages for the Parish of Orleans, State of Louisiana, is hereby

authorized and directed to cancel and erase from the public records of his office all liens, mortgages and encumbrances, but only insofar as they may affect the property described in Exhibits "A" and "B" attached hereto, including without limitation, those liens, mortgages and encumbrances as shown on Exhibit "D" attached hereto except for those certain chattel mortgages as shown on Exhibit "C" attached hereto.

SO ORDERED, this 17th day of June, 1986, at New Orleans, Louisiana.

T. H. Kingsmill, Jr.

U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF
TULANE HOTEL INVESTORS — NUMBER 84-02145-K

DEBTOR — CHAPTER 7

ORDER

This matter having come on for hearing before the Court this date after due notice on the debtor's motion entitled, "Motion For Rule 62(f) Stay Order", actually for a stay of this Court's Order for the sale of property under Bankruptcy Rule 8005, and the trustee's motion to ratify acceptance of lease and to designate proper party to exercise option under lease; the issues having been duly tried and considering the memoranda filed, the arguments of counsel, the evidence presented and the record herein,

IT IS ORDERED that the motion of Jean H. Turner, Trustee, to ratify acceptance of lease and to designate proper party to exercise option under lease be it hereby is GRANTED.

IT IS FURTHER ORDERED that the lease in question be and it hereby is deemed ACCEPTED.

IT IS FURTHER ORDERED that Jean H. Turner, trusteee, be and she hereby is designated as the proper party to exercise the option under the lease in question.

IT IS FURTHER ORDERED that the debtor's motion for stay of this Court Ordered dated June 17, 1986 for the sale of property under Bankruptcy Rule 8005 be and it hereby is DENIED.

New Orleans, Louisiana, this 4th day of AUGUST, 1986.

/s/ T. H. Kingsmill, Jr.

T. H. KINGSMILL, JR.
BANKRUPTCY JUDGE

TRUE COPY
AUG 4 1986

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF
TULANE HOTEL INVESTORS — NUMBER 84-02145-K

DEBTOR — CHAPTER 7

FINDING OF FACT
CONCLUSIONS OF LAW

This matter came on for hearing on (1) the motion of the trustee to ratify acceptance of lease and designate proper party to exercise option under lease and (2) the motion of the debtor entitled "Motion for Rule for F.R.C.P. 62(f) Stay Order" which is in fact for a stay under Bankruptcy Rule 8005.

FINDINGS OF FACT

1.

This proceeding was initiated as a Chapter 11 reorganization and was subsequently converted to liquidation under Chapter 7 of the Bankruptcy Code.

2.

On December 5, 1985 an interim trustee was appointed and was approved as operating trustee to continue the business of Bayou Plaza.

3.

More than sixty (60) days have passed; and although the trustee has not filed a formal acceptance or rejection of the lease, the trustee has continued to comply with all the terms and conditions of the ground lease including payment of all monthly rental payments since her appointment.

4.

The trustee, in her capacity as an operating trustee, has performed the following acts to wit:

1) Continued operation of the hotel;

2) Paid monthly lease obligations;

3) Paid the taxes and insurance for the benefit of the lessor;

4) Negotiated for the private sale of the leasehold interest; applied for sale by public auction;

5) Declared in open court of the intentions of the trustee to liquidate the leasehold interest and leasehold inprovements;

6) Advertised the public acution sale.

7) Sent court notices to the lessor and/or counsel representing the lessor.

5.

Pursuant to paragraph 21 of the ground lease, the lessee (assignee) has the right and privilege to extend the terms of the lease for an additional twenty (20) years which right to extend expires on August 27, 1986.

6.

Walter Brown, the lessor, testified that at no time did he deem the lease to be rejected and at all times considered the lease to be in full force and effect.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction pursuant to 27 U.S.C. §1334, 28 U.S.C. §157 and 11 U.S.C. §365.

2.

11 U.S.C. §365 provides in part:

> "Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an enexpired lease assume of reject an enexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date ot the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor."

3.

The jurisprudence interpreting 11 U.S.C. §365(d)(4) has developed into two distinct lines. The first line of cases pertains to the general rule that if no action to accept the lease is taken within 60 days, then by operation of §365(d)(4), the lease is deemed to be rejected. The other line of cases is an exception to that general rule. This case falls into the exception whereby the Bankruptcy Court may resort to equitable considerations and principles in the enforcement of §365.

4.

The trustee correctly points to the line of cases which allows the Bankruptcy Court to deem certain actions of both the trustee (or debtor where applicable) and a lessor as an acceptance.

This Court has previously ruled that payment of rents by the debtor and acceptance by the lessor is tantamont to an acceptance of the lease. See *In re The Bounty Corporation* #83-01315-K judgment of June 6, 1986 (unreported decision of U.S. Bankruptcy Court for the Eastern District of Louisiana citing *The Curio Shoppe, Inc.*

55 B.R. 148 (Bktcy. Conn. 1985).

Furthermore, the Fifth Circuit in *Barkin v. Sills,* 377 F.2d 1 (5th Cir. 1967) ruled that the provision in the Bankruptcy Act requiring a trustee to accept or reject a lease within 60 days was inserted for the benefit of the lessor who may waive the right accorded by the terms of the statute. *Id* at 3.

The debtors, in their memorandum filed today in opposition to the trustee's motion argue that *In re Lovitt,* 757 F.2d 1035 (9th Cir. 1985) *Cert. denied* 106 S.Ct. 145 (1985) is controlling.

The Court disagrees and concludes that *Lovitt is distinguishable in its facts. In Lovitt,* the trustee took no action to asume the leases *nor did he tender payment.*

In this case the trustee has made payment and continued to operate the business. The case is clearly distinguishable and the Court finds the lease to be accepted under the jurisprudence cited herein. See *Matter of Zacherl,* 14 B.R. 1001 (Bkrtcy. W.D. Penn. 1981) which that a trustee's petition for sale of an unexpired lease operated as an assumption thereof.

Next, the movers assert in their memorandum in opposition to the trustee's motion to ratify, that certain cases relied on by the trustee are of no value as the issue herein involves §365(d)(1), not §365(d)(4). While the Court does not rely on the case cited, *In re T. F. P. Resources, Inc.,* 13 B.C.D. 1104 (Bktcy. S.D.N.Y. 1985), the Court points out that both §365(d)(1) and §365(d)(4) are essentially equivilent in substance, with (d)(1) dealing with residential real property and (d)(4) dealing with non-residential real property.

The movers herein previously moved the District Court for the Eastern District for a stay pursuant to F.R.C.P. 62(f) and were ordered by Judge Charles Schwartz to first move the Bankruptcy Court pursuant to Bankruptcy Rule 8005 for a stay of the sale pending appeal.

This decision is rendered in light of the Order of Judge Schwartz and his instructions to the movers in reference to Rule 8005.

The movers have not shown to the Court's satisfaction any legally sufficient reason to stay the sale set by this Court for August 11, 1986.

New Orleans, Louisiana, this 4th day of AUGUST, 1986.

/s/T. H. Kingsmill, Jr.

T. H. KINGSMILL, JR.
BANKRUPTCY JUDGE

TRUE COPY
AUG 4 1986

APPENDIX D

LAW OFFICES
Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot
21st Floor, Pan-American Life Center
601 Poydras Street • New Orleans, Louisiana 70130-6097
Telephone: (504)586-1241 Telephone: (504) 569-2142
Cable: Lemmor Telex: 59-4872

February 27, 1986

Tulane Hotel Investors Ltd.
Partnership
4040 Tulane Avenue
New Orleans, LA 70119

Re: Tulane Hotel Investors Ltd. Partnership - Lease Agreement with Mrs. Lois Stern and Mr. Walter Brown, dated October 4, 1957, Relevant to the property bearing the Municipal No. 4040 Tulane Avenue, City of New Orleans, State of Louisiana

Dear Sir:

Due to the failure of the bankruptcy estate of Tulane Hotel Investors Ltd. Partnership to assume the captioned lease, said lease has been deemed rejected by that estate pursuant to §365 of the United States Bankruptcy Code, and is now a lease between the captioned lessors and Tulane Hotel Investors Ltd. Partnership as a non-bankruptcy entry. Pleadings are being filed with the United States bankruptcy Court confirm the status of the captioned lease agreement.

Pursuant to §21 of the captioned lease agreement, you are hereby given notice that the lessors demand that you determine whether or not you desire to exercise your option to extend the original term of said lease for twenty (20) years, and that if you have not given notice of your intent to exercise said option within six (6) months of this notice, the option shall be null and void.

Yours truly,

/s/ James C. Butler

JAMES C. BUTLER

JCB/jeb
cc: Jean Hebert Turner, Trustee
Robert G. Stassi

(WRITTEN) 3/3/86 mailed copy to Betty Mullin.

TULANE HOTEL INVESTORS CORPORATION
4040 TULANE AVENUE
New Orleans, Louisiana 70119
(504)486-1121

August 19, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. D. Michael Dendy, Esq.
Lemle, Kelleher, Kohlmeyer, Dennery,
Hunley, Moss & Frilot
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, LA. 70130-6097

Re: Tulane Hotel Investors Ltd. Partnership - Lease Agreement with Mrs. Lois Stern and Mr. Walter Brown, dated October 4, 1957, Relevant to the property bearing the Municipal No. 4040 Tulane Avenue, City of New Orleans, State of Louisiana

Dear Mr. Dendy:

Please be advised that Tulane Hotel Investors Corporation ("THIC") is the partner of Tulane Hotel Investors Limited Partnership ("THILP") and is authorized pursuant to the articles of partnership to conduct all business on behalf of THILP.

In response to your firm's letter of February 27, 1986, a copy of which is enclosed, the partnership hereby exercises its option to extend the original term of the said lease for twenty (20 years.)

By copy hereof we are instructing First Financial Bank, FSB to continue to make the rental payments on behalf of the non-bankrupt estate of THILP. Please credit that estate accordingly as the checks are received as you have done in the past.

Very truly yours,

Minna Ree Winer Miranne
President, Tulane Hotel Investors Corporation

MWM/ms
Enclosure
cc: First Financial Bank, FSB

APPENDIX E

UNITED STATES OF AMERICA

STATE OF (seal) LOUISIANA

Civil District Court for the Parish of Orleans

I, DAN FOLEY, Clerk of the Civil District Court for the Parish of Orleans, DO HEREBY CERTIFY,

That the attached judgment on rule for preliminary injunction is a true and correct copy of the original judgment on rule for preliminary injunction on file in the archives of my office entitled First Financial Bank, F.S.B. VS Tulane Hotel Investors Limited Partnership, A Louisiana Partnership in Commendam No. 85-8279 of this Honorable Court.

seal IN TESTIMONY WHEREOF, I Hve hereunto set my hand and affixed the seal of the said Court, at the CITY OF NEW ORLEANS, on this 24th day of June, in the year of our Lord, one thousand nine hundred and Eighty-Six and in the two hundredth Tenth year of the Independence of the United States of America.

/s/ Dan Foley Clerk.

I, REVIUS O. ORTIQUE, JR. pressiding Judge of the Civil District Court for the Parish of Orleans, DO HEREBY CERTIFY THAT DAN FOLEY, is the Clerk of said Court, that the same is a Court of Record having probate jurisdiction, and that the signature DAN FOLEY Clerk, to the foregoing certificate is in the proper handwriting of him, the said DAN FOLEY, Clerk; to his official act as such, full faith and credit are due; and owing; and I DO FURTHER CERTIFY that his attestation is in due form of law.

Given under my hand , at the City of New Orleans, on the 24th day of June in the year of Our Lord, one thousand nine hundred Eighty-six.

/s/ Revius O. Ortique, Jr.
Presiding Judge

I, DAN FOLEY, Clerk of the Civil District Court for the Parish of Orleans, DO hereby certify that REVIUS O. ORTIQUE, JR. whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Civil District Court for the Parish of Orleans, duly appointed and commissioned and qualified as such, as such, and that said attestation is in due form of law.

WITNESS my hand and the seal of said Court, this 24th day of JUNE 1986

/s/ Dan Foley Clerk.

EXHIBIT A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

No. 85-8279 DIVISION "K" Docket #4

FIRST FINANCIAL BANK, F.S.B.

versus

TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP,
A LOUISIANA PARTNERSHIP IN COMMENDAM

Filed _____, 1985 Deputy CLerk _____

JUDGMENT ON RULE
for
PRELIMINARY INJUNCTION

This matter came up for a hearing on August 12 and 13, 1985, on the issuance of a Preliminary Injunction, a Temporary Rstraining Order having been previously granted in favor of the Defendants:

Present: Betty F. Mullin,
Attorney for Plaintiff

James F. Quaid and
Robert G. Stassi,
Attorneys for Defendant

The Court after hearing the testimony of the witnesses, the argument of Counsel; the foregoing verified Petition for Injunction being considered; and for the reasons orally assigned:

IT IS ORDERED that the said Rule for Preliminary Injunction be made absolute and accordingly a Writ of Preliminary Injunction isue herein in favor of the Defendant, TULANE HOTEL INVESTORS LIMITED PARTNERSHIP, A LOUISIANA PARTNERSHIP IN COMMENDAM, and against the Plaintiff, FIRST FINANCIAL BANK, F.S.B., enjoining, restraining and/or prohibiting Plaintiff or anyone acting at its direction from proceeding with any sale, alienation or application of any and/or all collateral, movable or immovable, held by the Plaintiff under any security instruments or anyone acting at his direction from proceeding with the sale of the following described property:

A. All of Mortgagor's Leasehold interest and estate, and all right, title interest and priviledges in and under that certain lease made and entered into by and between Mr. Lois Stern, wife of Walter Brown (and the said Walter Brown by intervention), as lessor and Pelican State Hotels orporation as lessee, dated October 4, 1957, and duly registered in COB 622, folio 126 on November 5, 1957, as amended May 22, 1958 and duly registered in COB 621, Folio 595 on June 6, 1958; All right, title and interest of Pelican State Hotels Corporation by Agreement of Merger dated December 19, 1961 and duly registered in COB 644, folio 287, on March 20, 1962; and all right, title and interest of Pennsylvania Real Estate Investment Trust was acquired by act under private signature, dated April 23, 1965, and duly registered in COB 668B, folio 254 on APril 26, 1965. Fontainbleau-Orleans acquired said interest by act before Louis G. Dutel, Jr. N.P., dated December 30, 1975, COB 738A, folio 406.

B. All of the following buildings and improvements located and/or situated on the following described 4000 Tulane Avenue, City of New Orleans, State of Louisiana, together with all the rights, ways, privileges, servitudes and appurtenances thereunto belonging or in anywise appertaining, situated on the leasehold hereinabove described and consisting more particularly of the following described property:

THAT CERTAIN PORTION OF GROUND, together with all rights, ways, privileges, servitudes and appurtenances thereunto belonging or in anywise appertaining, situated in the First District of the City of New Orleans, designated as SQUARE NO. 763, bounded by TULANE and Carrollton Avenues and Gravier and South Pierce Streets, and according to a survey made by P. C. Gandolfo, Jr., Surveyer, dated July 7, 1937, a blue print copy of which is annexed to an Act before Robert Legier, Notary Public, on March 21, 1941, which survey was redated December 16, 1947, a blue print copy of which survey was annexed to an Act before Ernest Carrere, Jr., Notary Public, on December 22, 1947, said square measures 424 feet, 7 inches, 2 lines, actual, 424 feet 2 inches, 6 lines, title, front on Carrollton Avenue, 425 feet, 9 inches, no lines actual, 425 feet 6 inches, 2 lines title, front on South Pierce Street, 604 feet 3 inches, 5 lines actual, 602 feet, 11 inches, 2 lines title, front, on Tulane Avenue, and 642 feet, 1 inch, 3 lines actual, 642 feet, 3 inches, no lines title, front on Gravier Street.

C. All machinery, equipment, furniture, fixtures and/or other property, of every nature and kind whatsoever, that has been placed in, upon or above the property hereinabove described for the service and operation of the buildings and improvements thereon or which is located thereon

for the use of Mortgagor, either directly or indirectly in such service or operation;

D. All existing leases and/or subleases granted by Pelican State Hotels Corporation, H. R. Weissberg Corporation, "The Fontainbleau Motel Hotel", Pennsylvania Real Estate Investment Trust, and/or Fontainbleau Hotel Corporation, as Lessor(s), to any present tenants, occupants, licensees, franchise and/or concession holders;

E. All of Mortgagor's Leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between the City of New Orleans, Louisiana, as lessor, and Fontainbleau-Orleans, as Ordinary Partnership in Commendam, as lessee, said lease being authorized by ordinance number 6134 date September 30, 1976 and approved by the City Council on October 21, 1976, and the Mayor of the City of New Orleans, Louisiana on October 22, 1976, and duly recorded in COB 743E, folio 118-124 of the conveyance records for the Parish of Orleans, on December 20, 1976:

Together with all buildiings and improvements, appurtenances and attachments, rights ways, privileges, servitudes, advantages, batture and abatture rights thereunto belonging or in anywise appertaining, including all immovables by nature or destination, and their component parts, now or hereinafter forming part of and attached to or connected with said property or used in connection therewith.

A. All corporeal movables of the Mortgager that are now and from time to time shall be located upon the above described premises for use in the

conduct and/or operation of the hereinabove business and commercial activity, namely, the hotel/motel now known as the "Fountain Bay Club Hotel", including without limitation all equipment, furniture, television sets, fixtures of every kind and description, without exception that are now or may come upon thee premises; and

B. That certain mass or assemblage of food and restaurant, supplies, including canned and frozen foods, beer, wine and other alcohol beverages and soft drinks, constituting the entire stock of supplies and inventory of Mortgagor now located or to be located at its place of cusiness known as the Fountain Bay Club Hotel located as 4040 Tulane Avenue, New Orleans, Louisiana 70119, it being intended, in accordance with Louisiana REvised Statutes, Title 9, Section 5351, that the lien of this mortgage shall attach to the purchases made to supply the place of any property disposed of and to other after acquired additions to said mass or assemblage of supplies and inventory.

which was seized pursuant to an Order of Executory Process issued on the 16th day of May, 1985, in the above entitled and numbered matter;

JUDGMENT READ, RENDERED and SIGNED, in open Court, this 14 day of August, 1985, at New Orleans, Louisiana.

(Sgd) Joseph V. DiRosa

JUDGE

A TRUE COPY
/s/ illegeble
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall...deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Sec. 2283 of the United States Code provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 11, Sec. 365(d)(4) of the United States Code provides that:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject any enexpired lease or nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

Title 11, Sec. 363(m) of the United States Code provides that:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease or property does not affect the validity or a sale or lease under such authorization to an entity that purchased or

leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were pending appeal.

(2)

Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-44

In The
Supreme Court of the United States
October Term, 1987

IN THE MATTER OF:
TULANE HOTEL INVESTORS
LIMITED PARTNERSHIP
a Louisiana Partnership,

Petitioner,

v.

FIRST FINANCIAL BANK, FSB,
a Federal Savings Bank, and
JEAN HEBERT TURNER, TRUSTEE,
a Trustee in Bankruptcy under Chapter 7,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DON M. RICHARD
Counsel of Record

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STATUTES

11 U.S.C. 365(d)(4) 1, 3

I. FACTS

On August 7, 1987 upon Motion for Payment of Administrative Claim filed in *In re: LaStrada Ristorante, Inc.*, No. 87-02611-BKC-THK (Bankr. E.D. La filed June 15, 1987) the debtor was ordered to pay $4,400.00 "rent for the month of July, 1987." The order was signed by United States Bankruptcy Judge T. H. Kingsmill, Jr. See Appendix A for full text of this order.

On August 18, 1987 in said *In re: LaStrada,* Bobbie McGee's Inc. (hereinafter "McGee's"), "landlord of an unexpired lease of non-residential real property under which the debtor is lessee," filed a Motion to Surrender Leasehold Premises to Landlord wherein McGee's stated that the debtor failed to comply with the provisions of 11 U.S.C. 365(d)(4) in that 60 days had elapsed since the granting of relief under 11 U.S.C. 1101 *et seq.* and that debtor had failed to accept or reject the lease. McGee's claimed the lease was deemed rejected by operation of 11 U.S.C. 365(d)(4). See Appendix B for full text of this motion.

Bankruptcy Judge T. H. Kingsmill, Jr. signed an order dated August 18, 1987 setting a hearing on McGee's motion for August 26, 1987. See Appendix C for full text of that order.

On August 27, 1987 Judge Kingsmill signed a Minute Entry wherein he found that "under the provisions of the code" McGee's was entitled to the relief sought in its Motion to Surrender Leasehold Premises to Landlord. This Minute Entry ordered the debtor to surrender the premises to McGee's in five days. See Appendix D for full text of this order.

Additionally on August 27, 1987 Judge Kingsmill signed an order in the *LaStrada* matter stating:

> IT IS ORDERED that the lease between Bobbie McGee's, Inc. and LaStrada Ristorante, Inc. be deemed rejected by debtor.

See Appendix E for full text of this order.

—o—

II. ARGUMENT

Freshmen law students are well aware that stare decisis means like facts will receive like treatment. *Flowers v. United States*, 764 F.2d 759, 761 (11th Cir. 1985), *quoting County of Monroe, Florida v. U.S. Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982).

It is a firm rule of the Fifth Circuit that precedent cannot be disregarded. *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981). This court has recognized that the doctrine of stare decisis "demands respect" in a society governed by the rule of law. *City of Akron v. Akron Center for Reprod. Health*, 103 S.Ct. 2481, 2487 (1983).

Despite these firm principles we note two significant anomolies:

First, the Fifth Circuit has failed to recognize the precedent and rules of law set forth in *In re: Tonry*, 724 F.2d 476 (5th Cir. 1984) (a lease or executory contract comes into the bankruptcy estate only when assumed by the trustee) and *In re Lovitt*, 757 F.2d 1035 (9th Cir.), *cert. denied*, 106 S.Ct. 145 (1985) (a bankruptcy court is without jurisdiction to enter an order confirming a trustee

sale of a lease rejected by operation of law; statutory presumption of rejection by trustee's non-action is conclusive).

Second, the bankruptcy court is not applying the rule of 11 U.S.C. 365(d)(4) consistently when presented with the same facts, i.e. failure of a debtor or trustee to assume or reject a lease within 60 days. It is particularly noteworthy that the bankruptcy court seemed to rely on the fact that the trustee paid rent as its primary basis for ruling in this case that the lease was not rejected. *See* Petition for Writ of Certiorari, pp. A-30 through A-34. In *In re: LaStrada, Inc.* (*see* Appendices) the same court even ordered the payment of rent only 20 days before it ruled the lease was rejected by operation of 11 U.S.C. 365(d)(4).

Petitioner cannot help but wonder whether the justice dispensed in the bankruptcy court below depends on who you are.

———o———

III. CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari filed herein on July 1, 1987 a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DON M. RICHARD
Counsel of Record

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Limited Partnership (LA)

APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

RE: LASTRADA RESTORANTE, INC.	)	NUMBER 87-02611-BKC-THK
DEBTOR	)	CHAPTER 11

ORDER

(Filed Aug. 11, 1987)

Present: Roy E. Blossman
Attorney for Federal Savings and Loan Insurance Corporation, as Receiver for New Orleans Federal

Richie Arnoult
Bobbie McGee's, Inc.

Not Present: John Keys
Attorney for Debtor

Considering the pleadings and argument of counsel regarding Bobbie McGee's Inc.'s Motion For Payment of Administrative Claim;

IT IS ORDERED that Lastrada Restorante, Inc. pay Four Thousand Four Hundred and No/100 ($4,400.00) to the Federal Savings and Loan Insurance Corporation, as receiver for New Orleans Federal, for the rent for the month of July, 1987.

New Orleans, Louisiana, this 7th day of August, 1987.

/s/ T. H. Kingsmill, Jr.
UNITED STATES
BANKRUPTCY JUDGE

2367S

APPENDIX B

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN RE BANKRUPTCY PETITION OF
LASTRADA RISTORANTE, INC.

CASE NO. 87-02611-BKC-THK

MOTION TO SURRENDER LEASEHOLD
PREMISES TO LANDLORD

(Filed Aug. 18, 1987)

Now into Court comes Bobbie McGee's, Inc., through its undersigned counsel, who respectfully avers that mover is entitled to have the leasehold premises of LaStrada Ristorante, located at 3528-18th Street in Metairie, Louisiana surrendered to it by the debtor who has failed to comply with the provisions of Title 11 § 365(d)(4) in the following respects:

1.

On or about June 15, 1987, the debtor filed for relief under Chapter 11 of the Bankruptcy Code and that 60 days have elapsed since the order granting relief was entered.

2.

Mover is the landlord of an unexpired lease of non-resident real property under which the debtor is the lessee, namely LaStrada Ristorante.

3.

Mover has failed to accept or reject the said lease in compliance with Title 11, § 365(d)(4) of the Bankruptcy Code and therefore, the lease is deemed rejected and mover

is entitled to an order requiring the debtor to immdiately surrender the said non-resident real property to the lessor.

4.

Debtor has at all times since the filing of the bankruptcy petition herein failed to pay the rent as required by the lease which is filed of record herein.

5.

Debtor has failed to obtain an order granting him an extension of time in which to accept or reject the said lease and, in fact, debtor has taken no action at all within the time periods allowed by law to preserve his rights to occupy the said premises.

Respectfully submitted,

/s/ Douglas A. Allen, Jr.
DOUGLAS A. ALLEN, JR.
Attorney for Mover
3900 River Road, Suite 9
Jefferson, LA 70121
Telephone: 831-4038

VERIFICATION

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared Richard E. Arnoult, who after being duly sworn did state that the facts and allegations contained in the foregoing are true and correct to the best of his knowledge and belief.

/s/ Richard E. Arnoult
RICHARD E. ARNOULT
President—Bobbie McGee's
Inc.

Sworn to and subscribed before me this
18th day of August, 1987
/s/ Douglas A. Allen, Jr.,
DOUGLAS A. ALLEN, JR.
Notary Public

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 18th day of Aug., 1987, served a .....(illegibile) ....

/s/ Douglas A. Allen, Jr.
DOUGLAS A. ALLEN, JR.,
Notary Public

APPENDIX C

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

IN THE BANKRUPTCY PETITION OF
LASTRADA RISTORANTE, INC.

CASE NO. 87-02611-BKC-THK

ORDER

Considering the foregoing verified motion.

IT IS HEREBY ORDERED that this matter be heard on the 26th day of August, 1987 at 10:30 o'clock a.m. New Orleans, Louisiana, this 18th day of August, 1987.

/s/ T. H. Kingsmill, Jr.
U.S. BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
KINGSMILL, J.
AUGUST 26, 1987

NUMBER
87-02611-K

IN THE MATTER OF
LASTRADA RISTORANTE, INC., DEBTOR

REORGANIZATION
CHAPTER 11

(Filed Aug. 31, 1987)

This matter came before the Court this date as a hearing on the motion of Bobbie McGee's Inc. to surrender leasehold premises to landlord.

PRESENT: Douglas Allen
Attorney for Bobbie McGee's

John T. Keys, Jr.
Attorney for Debtor

Counsel for the debtor advised the Court that the rents have been assigned to FSLIC, which FSLIC would be the proper party to bring said motion. Counsel for Bobbie McGee's advised the Court he has spoken with counsel for FSLIC who has no opposition to said motion. The Court recessed and later convened at which time Roy E. Blossman, counsel for FSLIC, appeared and concurred with counsel for Bobbie McGee's. Considering further statements of counsel and the record herein,

The Court, under the provisions of the code, believes the lessor is entitled to relief. Accordingly,

IT IS ORDERED that Lastrada Ristorante, Inc., debtor herein, surrender said premises to Bobbie M Gee's and FSLIC no later than SEPTEMBER 1, 1987.

New Orleans, Louisiana, August 27, 1987.

/s/ T. H. Kingsmill, Jr.
U. S. BANKRUPTCY JUDGE

Douglas Allen
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Jefferson, LA 70121

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Metairie, LA 70002

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N. O., LA 70130

8/28/87—joc

APPENDIX E

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

RE: LASTRADA RISTORANTE, INC.	)	NUMBER
	)	87-02611-BKC-THK
DEBTOR	)	
	)	CHAPTER 11

ORDER

(Filed Aug. 31, 1987)

Present: Roy E. Blossman
Attorney for Federal Savings and Loan
Insurance Corporation, as Receiver for
New Orleans Federal

Douglas A. Allen, Jr.
Attorney for Bobbie McGee's, Inc.

John Keys
Attorney for Debtor

Considering the pleadings and argument of counsel regarding Bobbie McGee's, Inc's Motion

For Surrender of Leasehold Premises;

IT IS ORDERED that the lease by and between Bobbie McGee's Inc. and LaStrada Ristorante, Inc. be deemed rejected by the debtor.

IT IS FURTHER ORDERED that LaStrada Ristorante, Inc. vacate and surrender the premises at 3528 18th Street, Metairie, Louisiana, within five (5) days of August 26, 1987.

New Orleans, Louisiana, this 27 day of August, 1987.

/s/ T. H. Kingsmill, Jr.
UNITED STATES
BANKRUPTCY JUDGE

2367S